

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

Submitted On Brief March 26, 2009

DONNA L. COLLINS v. RANDY M. COLLINS

Direct Appeal from the Chancery Court for Sumner County
No. 2007D-252 Tom E. Gray, Chancellor

No. M2008-00930-COA-R3-CV - Filed May 5, 2009

In this divorce action, Husband appeals the trial court's award of \$4,850.00 to Wife for attorney fees and its determination that Wife may possess the marital home until the parties' children graduate from high school. We affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed; and
Remanded**

DAVID R. FARMER, J., delivered the opinion of the court, in which HOLLY M. KIRBY, J., and J. STEVEN STAFFORD, J., joined.

C. Tracey Parks, Lebanon, Tennessee, for the appellant, Randy M. Collins.

John R. Phillips, Jr., Gallatin, Tennessee, for the appellee, Donna L. Collins.

OPINION

Background/Procedural History

Randy M. Collins ("Husband") and Donna L. Collins ("Wife") had been married for seventeen years when Wife filed for divorce on July 16, 2007. At the time of trial, Wife was 43 years of age and Husband was 50. Although Husband previously earned approximately \$50,000.00 a year at his prior job, he is currently employed in Kentucky and makes \$400.00 a week. Likewise, Wife is currently employed in the Sumner County Extension's 4-H program and makes \$8.00 an hour. Wife has a high school degree and is currently attending Volunteer State Community College. During the marriage, Wife worked primarily in a children's after-school program because the parties thought it was best that she remain at home.

The parties have two minor children, ages 14 and 16. The trial court determined that Wife should be the primary residential parent of the parties' children. It set up a parenting schedule where Wife was designated as the primary residential parent of both children, and Husband has parenting

time every other weekend from Thursday afternoon until Sunday afternoon. At trial, Wife estimated that it would cost her \$1,000.00 a month to rent a suitable home for the children and explained the following:

Well, looking at the money figures, I mean, I don't feel like . . . I can provide an adequate home for the boys, not staying there, and also, you know, just for the well-being of the boys. Matt's a sophomore, he makes great grades, he makes straight As, he's looking at colleges right now and to pull him out would interfere with that. Mitchell, Mitchell struggles a little bit more, but he's doing better than he was at the beginning of the school year[.]

Wife sought, therefore, to live in the marital home until the parties' two children had finished high school.

The marital home was the parties' most valuable asset. Husband's parents provided approximately five acres of land upon which the parties built their home. Both parties contributed to the construction costs. At trial, the parties stipulated to an appraisal that valued the house at \$195,000.00.¹ The property was encumbered, however, by a home equity line of credit that totaled \$53,600.00 at the time of trial. Wife testified that their equity line of credit is structured so that they only pay the interest that accrues on the line of credit; Wife approximated that \$360.00 in interest is due every month. Wife admitted that she withdrew \$6,000 from the equity line of credit in anticipation of filing for divorce. She testified that she paid \$3,000.00 of this to her attorney, and she used the remainder for living expenses. Husband testified that Wife was paying \$60.00 a month to pay back the \$6,000.00.

Husband testified at trial that he wished to purchase the home. He offered to pay wife \$62,000 for the house and the parties' Trailblazer and assume the existing line of credit and property taxes. Husband explained that he did not want Wife to tie his equity up in the house for four years. Husband also testified that he preferred not to sell the property and wanted to buy Wife's equity in the home because his elderly mother lived nearby.

After hearing all of the evidence, the trial court entered a Final Decree of Divorce on March 11, 2008. Subsequently, Wife filed a Motion to Alter or Amend to correct a clerical error, and Husband also filed a Motion to Alter or Amend the Final Decree of Divorce seeking modification and clarification of the personalty awarded. The trial court then entered an Amended Final Decree of Divorce on April 1, 2008. In the Amended Final Decree of Divorce, the trial court ordered Husband to pay \$529.00 per month in child support and rehabilitative alimony in the amount of \$200.00 per month for 36 months. It also ordered Husband to pay \$4,850.00 of Wife's attorney fees, as alimony *in solido*. In equitably dividing the marital property, the trial court awarded Wife a 56% interest in the marital home and gave Husband a 44% interest in the marital home. The Amended Final Decree of Divorce also provided that

¹ Husband testified, however, that he believed that the fair market value of the marital home was \$180,000.00.

[t]he Wife may, at her option, occupy this marital residence until the youngest child, Mitchell, graduates from high school or until the remarriage of the Wife. In the event of the Wife's remarriage prior to the youngest child's (Mitchell's) high school graduation, then in that event she is required to vacate the premises within thirty days of remarriage with the property placed on the market for sale. Upon Mitchell's graduation from high school the property shall be placed on the market within fifteen days. When the property is placed on the market for sale either party may bid or negotiate purchase of the property.

Pending sale of the property no unrelated person shall reside there.

Pending sale of the property the Wife shall pay 56% of taxes and insurance and the Husband shall pay 44% of such expense. Major maintenance expenses, such as repair or replacement of the roof, the heating and air conditioning system or the hot water heater, shall also be paid 56% by the Wife and 44% by the Husband.

During her residence at [the marital home] the Wife shall be solely responsible for maintaining necessary minimum payments upon the parties' mortgage or equity line of credit with the Farmers Bank and shall not commit waste; i.e., destruction of buildings or cutting trees on the property.

Pending sale of the property neither party shall make additional draw upon such line of credit.

The trial court explained that both parties had an equal responsibility for the debt owed for their equity line of credit. Wife, however, was responsible for making the minimum monthly payments while she occupied the marital home. The trial court explained:

The wife has requested that the Court give consideration to her occupying the marital residence until the youngest child turns 18. With her limited income, the limited income of the father, also, and considering what is in the best interest of these two children, the Court finds that it is indeed in the best interest of the children, and that's the primary consideration for the Court, that the wife and children to occupy the residence at 1064 Johnny Spears Road, Westmoreland, until the youngest child graduates from high school or upon remarriage of the mother. . . .

. . . .

The wife is to pay the line of credit, the interest, for so long as she resides in the residence. Considered what she would have to pay and that she could probably not find any suitable environment for the children at that amount, this was the prime consideration for the Court.

On May 1, 2008, Husband filed both a Notice of Appeal and another Motion to Alter or Amend the Final Decree of Divorce.² In his Motion to Alter or Amend Husband sought, among other things, for the trial court to order the sale of the marital home. The trial court entered an Order on June 6, 2008, that made some modifications to the personalty awarded, but the Order denied Husband's motion to sell the real property. The court opined that "the parties' children need to complete high school and need to be stable and secure during this process."

Issues

Husband asserts the following two issues on appeal:

1. Whether the proof preponderates in favor of the trial court[']s determination that the real property should not be sold before the minor children graduate high school.
2. Whether the trial court erred in assessing Wife's attorney fees against Husband.

Wife raises only the following issue for our review:

Whether Wife is entitled to an award of attorney[']s fees incurred on this appeal.

Standard of Review

Because this case was tried before the trial court, we review the decision *de novo* upon the record and presume the correctness of the trial court's factual findings. Tenn. R. App. P. 13(d); *Fowler v. Wilbanks*, 48 S.W.3d 738, 740 (Tenn. Ct. App. 2000). We will not reverse the trial court's factual findings unless they are contrary to the preponderance of the evidence. *Berryhill v. Rhodes*,

²Pursuant to Rule 4 of the Tennessee Rules of Appellate Procedure, we perceive Husband to timely appeal the trial court's Order responding to Husband's second Motion to Alter or Amend. The relevant portions of Rule 4 state the following:

(d) Premature Filing of Notice of Appeal. A prematurely, filed notice of appeal shall be treated as filed after the entry of the judgment from which the appeal is taken and on the day thereof.

(e) Effect of Specified Timely Motions on Trial Court's Jurisdiction. The trial court retains jurisdiction over the case pending the court's ruling on any timely filed motion specified in subparagraph (b) or (c) of this rule. A notice of appeal filed prior to the trial court's ruling on a timely specified motion shall be deemed to be premature and shall be treated as filed after the entry of the order disposing of the motion and on the day thereof. If an appellant named in a premature notice of appeal decides to terminate the appeal as a result of the trial court's disposition of a motion listed in subparagraph (b) or (c) of this rule, the appellant shall file in the appellate court a motion to dismiss the appeal pursuant to Rule 15.

21 S.W.3d 188, 190 (Tenn. 2000). For it to preponderate against a trial court's finding of fact, the evidence must support another finding of fact with greater convincing evidence. *Mosley v. McCanless*, 207 S.W.3d 247, 251 (Tenn. Ct. App. 2006). If the trial court's factual determinations are based on its assessment of witness credibility, this Court will not reevaluate that assessment absent clear and convincing evidence to the contrary. *Jones v. Garrett*, 92 S.W.3d 835, 838 (Tenn. 2002). If the trial court fails to make findings of fact, however, our review is *de novo* with no presumption of correctness. *Archer v. Archer*, 907 S.W.2d 412, 416 (Tenn. Ct. App. 1995). On the other hand, we review the trial court's application of law *de novo* with no presumption of correctness. *Bowden v. Ward*, 27 S.W.3d 913, 916 (Tenn. 2000). Similarly, we review mixed questions of law and fact *de novo*, with no presumption of correctness. *State v. Thacker*, 164 S.W.3d 208, 248 (Tenn. 2005).

In this divorce case, Husband challenges the trial court's equitable division of the marital assets and Wife's spousal support. The trial court has wide latitude in dividing the marital assets and awarding alimony. *Owens v. Owens*, 241 S.W.3d 478, 490 (Tenn. Ct. App. 2007); *Brown v. Brown*, 913 S.W.2d 163, 169 (Tenn. Ct. App. 1994). An award of attorney fees lies in the discretion of the trial court, and we will not reverse absent an abuse of that discretion. *Owens*, 241 S.W.3d at 495. A trial court abuses its discretion when the evidence does not support the court's decision, when the court applies an incorrect legal standard, or when it reaches a decision that contravenes logic or employs reasoning that causes an injustice to the complaining party. *Id.* at 496. Likewise, trial courts are afforded great discretion when dividing marital property. *Sullivan v. Sullivan*, 107 S.W.3d 507, 512 (Tenn. Ct. App. 2002.) Because of this wide discretion, we will generally defer to the trial court's division of the marital property unless it is inconsistent with the statutory factors or is not supported by a preponderance of the evidence. *Kinard v. Kinard*, 986 S.W.2d 220, 231 (Tenn. Ct. App. 1998).

Analysis

Husband's argument on appeal is two-fold. He alleges that the trial court erred by ordering Husband to pay \$4,850.00 of Wife's attorney fees as alimony *in solido*. He also argues that the evidence preponderates against the trial court's determination that Wife should be permitted to reside in the marital residence until the parties' youngest child graduates from high school. For the following reasons, we affirm the trial court.

Marital Home

We first address Husband's assertion that the trial court erred by permitting Wife to reside in the marital home until the parties' youngest child graduates from high school. The parties do not dispute that the home is marital property, and Husband does not allege that the trial court failed to equitably divide the marital property. Rather, Husband asserts that the evidence does not preponderate in favor of delaying a sale of the marital residence and there is no substantive proof in the record that a sale would be harmful to the children. Applying the applicable standard of review for a trial court's division of marital property, we perceive

Husband's argument to be that the evidence preponderates against the trial court's finding that Wife would be unable to find suitable alternative housing at a price that she could afford to pay. To support his contention, Husband claims that Wife would receive \$80,000.00 upon the sale of the marital home. Husband alleges that this amount, combined with Wife's monthly income, would enable her to afford alternative housing suitable for the children.

After classifying property as separate or marital, the trial court must equitably divide the marital property between the two parties considering the statutory provisions in Tennessee Code Annotated Section 36-4-121.³ The division of marital property in an equitable manner does not require that the trial court divide the property equally. *Robertson v. Robertson*, 76 S.W.3d 337, 341 (Tenn. 2002). The division of marital assets is not a mechanical process, and the trial court has the power to do what is reasonable under the circumstances. *Keyt v. Keyt*, 244 S.W.3d 321, 328 (Tenn. 2007). As is relevant in this case, Tennessee Code Annotated specifically provides that a trial court "may award the family home and household effects, or the right to live therein and use of the household effects for a reasonable period, to either party, but shall give consideration to a spouse having physical custody of a child, or children of the marriage." Tenn. Code Ann. § 36-4-121(d) (2005).

Tennessee Code Annotated Section 36-4-121(d) does not mandate that a party seeking to acquire the family home show any type of special need. *Mahaffy v. Mahaffy*, 1989 WL 128923, at *2 (Tenn. Ct. App. 1989). It was not necessary, therefore, for Wife to show that she cannot afford to live somewhere else. The trial court, in fact, articulated various reasons why it awarded

³The statute provides:

(c) In making equitable division of marital property, the court shall consider all relevant factors including:

- (1) The duration of the marriage;
- (2) The age, physical and mental health, vocational skills, employability, earning capacity, estate, financial liabilities and financial needs of each of the parties;
- (3) The tangible or intangible contribution by one (1) party to the education, training or increased earning power of the other party;
- (4) The relative ability of each party for future acquisitions of capital assets and income;
- (5) The contribution of each party to the acquisition, preservation, appreciation, depreciation or dissipation of the marital or separate property, including the contribution of a party to the marriage as a homemaker, wage earner or parent, with the contribution of a party as homemaker or wage earner to be given the same weight if each party has fulfilled its role;
- (6) The value of the separate property of each party;
- (7) The estate of each party at the time of the marriage;
- (8) The economic circumstances of each party at the time the division of property is to become effective;
- (9) The tax consequences to each party, costs associated with the reasonably foreseeable sale of the asset, and other reasonably foreseeable expenses associated with the asset;
- (10) The amount of social security benefits available to each spouse; and
- (11) Such other factors as are necessary to consider the equities between the parties.

Tenn. Code Ann. § 36-4-121(c) (2005).

Wife possession of the marital home including both parties' limited resources and that it was in the best interest of the children to live in a stable environment while attending school. Although Husband complains that the trial court's award ties up his equity in the home for the next four years, we have previously rejected the argument that this inherently renders such an award to be error. *Shands v. Shands*, 1989 WL 51529 (Tenn. Ct. App. 1989) (granting wife exclusive possession of the marital home until the youngest child reached age 18 or completed high school, whichever occurred first, was proper where parties had a 14 year old child in the sixth grade), *see also Mahaffy v. Mahaffy*, 1989 WL 128923, at * 2 (Tenn. Ct. App. 1989). Accordingly, we affirm the trial court's decision to award Wife possession of the marital home until the parties' youngest child graduates from high school.

Attorney Fees

Husband also asserts that the trial court should have awarded Wife less attorney fees. An award of attorney fees to an economically disadvantaged spouse is characterized as alimony *in solido*. *Owens v. Owens*, 241 S.W.3d 478, 495 (Tenn. Ct. App. 2007). A trial court's decision to award attorney fees lies soundly within its discretion, and we will not reverse absent an abuse of that discretion. *Owens v. Owens*, 241 S.W.3d 478, 495 (Tenn. Ct. App. 2007). As with any alimony award, the trial court must balance the various factors enumerated in Tennessee Code Annotated § 36-5-121(i).⁴ *Storey v. Storey*, 835 S.W.2d 593, 597 (Tenn. Ct. App. 1992). The

⁴The following are the factors listed in Tennessee Code Annotated § 36-5-121(i):

- (1) The relative earning capacity, obligations, needs, and financial resources of each party, including income from pension, profit sharing or retirement plans and all other sources;
- (2) The relative education and training of each party, the ability and opportunity of each party to secure such education and training, and the necessity of a party to secure further education and training to improve such party's earnings capacity to a reasonable level;
- (3) The duration of the marriage;
- (4) The age and mental condition of each party;
- (5) The physical condition of each party, including, but not limited to, physical disability or incapacity due to a chronic debilitating disease;
- (6) The extent to which it would be undesirable for a party to seek employment outside the home, because such party will be custodian of a minor child of the marriage;
- (7) The separate assets of each party, both real and personal, tangible and intangible;
- (8) The provisions made with regard to the marital property, as defined in § 36-4-121;
- (9) The standard of living of the parties established during the marriage;
- (10) The extent to which each party has made such tangible and intangible contributions to the marriage as monetary and homemaker contributions, and tangible and intangible contributions by a party to the education, training or increased earning power of the other party;
- (11) The relative fault of the parties, in cases where the court, in its discretion, deems it appropriate to do so; and
- (12) Such other factors, including the tax consequences to each party, as are necessary to consider the equities between the parties.

most important factors to consider are the need of the economically disadvantaged spouse and the ability of the obligor spouse to pay. *Id.* at 495.

Husband does not object to an award of alimony *in solido*; instead, Husband argues that the trial court erred in calculating the amount of attorney fees that he should pay. Wife's attorney submitted an affidavit that Wife incurred \$5,631.25 in attorney fees during the divorce proceedings. The trial court ordered Husband to pay \$4,850.00 of those fees.⁵ Because Wife admitted that she already paid her attorney a \$3,000.00 retainer using money she took from the value of the home using the parties' equity line of credit, Husband argues that the trial court's attorney fee award requires Husband to pay more in attorney fees than Wife actually incurred. Husband contends that the attorney fee award should not have exceeded \$2,631.25, the balance allegedly due on the attorney fees.⁶ Husband requests that we modify the attorney fee award accordingly. Husband is essentially asserting that because he is at least partially responsible for paying the \$3,000.00 debt incurred by Wife to pay her attorney fees, the additional attorney fee award allows Wife to double dip, forcing Husband to pay a portion of Wife's attorney fees twice. In response, Wife argues that she is obligated to make the minimum monthly payment of \$360.00 on the parties' equity line of credit, so Wife will have repaid more than \$3,000.00 of the debt by the time the parties sell the marital home.⁷ Wife testified at trial, however, that the minimum monthly payments on the equity line of credit are interest- only. Because they will never decrease the principal owed on the loan, Wife's \$360.00 monthly payments fail to reacquire any value lost from Wife's decision to increase the equity line of credit.

We find that the trial court properly awarded Wife \$4,850.00 in attorney fees. There is no dispute that the parties' home was marital property and that the equity line of credit on the home was marital debt. The trial court was aware that Wife paid some of her attorney fees with money acquired through the parties' equity line of credit. Nevertheless, it divided the \$53,600.00 debt on the marital home equally between the parties and awarded Wife \$4,850.00 in attorney fees. Husband's argument presupposes that his portion of the marital debt includes the \$3,000.00 that Wife paid her attorney. We do not agree with this presumption. We believe that the trial court's attorney fee award was to reimburse Wife for the attorney fees she paid. While she did pay her attorney out of the borrowed funds, her debt on these funds still exist. The justness of a particular division of the marital property and allocation of marital debt depends on its final results. *See Thompson v. Thompson*, 797 S.W.2d 599, 604 (Tenn. Ct. App.1990). Although, the trial court did not specify which party it charged the \$3,000 debt to, we do not believe that the trial court's final allocation of debt indicates any abuse of its discretion. In addition, we find no

⁵Thus, Husband was ordered to pay all but \$781.25 of Wife's attorney fees.

⁶Husband seeks to be credited for the full \$3,000 from the home's equity that Wife expended on attorney fees. This argument, however, ignores the fact that Wife also had an interest in the marital home.

⁷Because the parties' youngest son was expected to graduate approximately four years from the trial date, Wife asserts that she will have paid \$17,800.00 on the loan by the time that the marital home is sold.

abuse of the trial court in its award of attorney fees, which in essence reimburses Wife for the fees she has already paid.

Wife seeks attorney fees on appeal. Exercising our discretion, we decline Wife's request for attorney fees.

Conclusion

For the foregoing reasons, we affirm the trial court. Costs of this appeal are taxed to the Appellant, Randy M. Collins.

DAVID R. FARMER, JUDGE